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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

In re the Marriage of STEVEN STUPP and ANNEMARIE SCHILDERS.	
STEVEN STUPP, Respondent, v. ANNEMARIE SCHILDERS, Appellant.	A143186 (San Mateo County Super. Ct. No. FAM0110799)

This is the second of nine appeals that Annemarie Schilders (Schilders) has initiated in connection with the dissolution of her marriage to Steven Stupp (Stupp). At issue here are five postjudgment orders issued by the family court on July 31, 2014: two orders concerning the attendance of Stupp and Schilders's child at preschool; an order that Schilders advance 40 percent of the cost of an updated custody evaluation, subject to reallocation by the court; an order dividing the cost of the child's therapy equally between the parties; and an order reserving Schilders's request for attorney's fees and costs.

We will dismiss the appeal of the orders concerning the child's preschool and the advancing of costs for the custody evaluation on the grounds that those are not appealable orders. In addition, the orders concerning preschool have been overtaken by later orders and events, with the result that any appeal would be moot. We will affirm the order requiring Schilders to pay half the cost of the child's therapy because Schilders did not

properly raise it below. We will affirm the order reserving Schilders's request for attorney's fees and costs because we presume the family court is correct, and Schilders has failed to present us with any argument or authority to the contrary, thus forfeiting her claim of error.

FACTUAL AND PROCEDURAL BACKGROUND

A. *The Context of the Appeal*

Stupp filed to dissolve his marriage to Schilders in 2010, shortly after their child was born. The proceedings below have been highly contested, with a primary area of dispute the legal and physical custody of the parties' child, who is now five years old and enrolled in a public-school kindergarten.

In March 2014, the family court entered a judgment of dissolution. The judgment and Schilders's unsuccessful attempts in the family court to vacate it are the subject of a separate appeal.[1] Here, Schilders contends that the family court erred in issuing certain postjudgment orders in July 2014, so we briefly discuss the relevant context of those orders.

In July 2012, the family court issued temporary custody orders after a hearing, giving Stupp and Schilders joint legal and physical custody of their child, who was then two years old. In August 2013, after an evidentiary hearing that addressed the choice of a preschool for the child, the family court ordered that the child begin preschool at the Peninsula Jewish Community Center (PJCC). The family court confirmed that order in a detailed written order filed in September 2013. In November 2013, as part of a settlement agreement, the parties agreed that Stupp would withdraw a pending motion for legal custody of the child, that Schilders would withdraw a pending motion regarding the child's preschool, and that the child would attend preschool at the PJCC through the end of the 2013-2014 school year. The settlement agreement and the July 2012 temporary custody order were incorporated in the March 2014 judgment.

[1] That appeal is Case No. A142302, in which we filed our opinion on the same day we issued this opinion.

The parties do not dispute that the July 2012 temporary custody order and the September 2013 custody order were in effect in April 2014, when Stupp submitted a new request for order, which led to the orders that are at issue in this appeal.

B. *Stupp's Requests for Orders and the Family Court's Ruling*

In April 2014, Stupp asked the family court to grant him temporary sole legal custody, pending a custody evaluation that would include a full psychological assessment of Schilders;[2] to reduce the amount of time the child spent with Schilders; and to require the child to continue attending preschool at the PJCC for summer camp and for the 2014-2015 school year, with attendance to be increased from three to five days per week. Schilders submitted opposition papers, and Stupp submitted a further declaration in support of his request.

Stupp's request was first heard by the family court on June 10, 2014. That day, the family court ordered that the child attend summer camp at the PJCC preschool three days a week, and scheduled a further hearing for June 23.

On June 18, 2014, Stupp asked the court to order that the child see a psychotherapist. At the June 23 hearing, the family court heard argument from both parties' counsel and took Stupp's requests under submission. On June 30, July 1, and July 2, 2014, Schilders filed additional material in opposition to Stupp's requests.

On July 2, 2014, Stupp submitted a declaration and request for emergency custody and visitation orders. Stupp reported that the child had been injured while in Schilders's care, that the child attributed the injuries to Schilders's friend Al Lerner (Lerner), and that Child Protective Services was investigating the situation. Stupp asked for orders reducing Schilders's visitation time, prohibiting Lerner from being present when the child was in Schilders's care, and requiring that visitation with Schilders be supervised. Schilders submitted declarations opposing Stupp's request. On July 8, the family court issued temporary emergency orders granting some of Stupp's July 2 requests, pending a hearing scheduled for July 22. Specifically, the court ordered that Lerner not be present

[2] A previous custody evaluation had been updated in 2012.

when the child was in Schilders's care and reduced Schilders's visitation time. On July 11 and July 21, 2014, Schilders filed additional material in opposition to Stupp's requests.

At the July 22, 2014, hearing, the court heard argument from the parties' counsel and testimony from Lerner. On July 25, Schilders served "Objections to Misleading Statements Made on Behalf of Petitioner at July 22, 2014 Hearing."[3] On July 28, Schilders filed and served objections to an income and expense declaration that Stupp had filed on July 25.

On July 31, 2014, the family court issued findings and orders after hearing, ruling on the issues it took under submission at the June 23 hearing and issues addressed at the July 22 hearing. Among other things, the family court lifted the restriction on Lerner's presence with the child and appointed Dr. Leslie Packer, who had previously served as custody evaluator in the case, "to conduct an updated evaluation as to the custodial issues between the parties and the [child], including a current appropriate timeshare reflecting the parties' current situations, the events that have occurred since Dr. Packer's last evaluation, the educational and emotional needs of the minor, and any other recommendations reflecting the best interests of the minor." Pending that evaluation, the timeshare would "revert to what existed before the issuance of the temporary emergency orders of July 8, 2014" and the child would attend preschool at the PJCC five days a week. The family court's orders are reflected in 10 numbered paragraphs. This appeal timely followed.[4]

C. *Schilders's Appeal and Further Orders from the Family Court*

Schilders contends that the family court erred in issuing five of its July 31 orders: two temporary orders regarding preschool attendance, one requiring the child to attend

[3] Schilders states that these objections were filed and served, but the record does not show that they were filed in the family court.

[4] Schilders concedes in her reply brief that this appeal concerns only the July 31, 2014 orders, despite language to the contrary in the Notice of Appeal and in her opening brief.

the PJCC preschool pending the conclusion of an updated custody evaluation and the other requiring Schilders to take the child to the preschool on her custodial time; an order that Schilders advance 40 percent of the cost of the custody evaluation, subject to reallocation by the court; an order that the cost of therapy for the child be equally divided between Stupp and Schilders; and an order reserving Schilders's request for attorney's fees and costs.

Events continued to unfold in the family court after Schilders filed her notice of appeal in September 2014. In December 2014, the family court ordered that the child be enrolled in public school, and it appears that the child has been attending kindergarten in public school since the beginning of the 2015-2016 school year. Also in December 2014, the family court ordered Stupp to bear the full cost of a second weekly therapy session for the child. Although the December 2014 orders were issued before Schilders filed her opening brief in May 2015, and although they are described in the register of actions that she provided in her appendix, she makes no mention of them in her opening brief.[5]

[5] We are dismayed by the way Schilders presented the facts to this court, especially the facts concerning the child's schooling, which is the issue that her briefs primarily address. As appellant, Schilders is required to provide a summary of the significant facts in her opening brief. (Cal. Rules of Court, rule 8.204(a)(2)(C).) But nowhere in her opening brief, filed in May 2015, does she inform us that the court made any orders after July 2014 regarding the child's education, much less that the child would be starting public school in fall 2015. In his respondent's brief, Stupp writes, "In December 2014, the court ordered [the child] to be enrolled in the San Carlos school district for the 2015-2016 school year. Thus, as of the start of the school year, [the child] is no longer attending PJCC, but has been attending a public school as a kindergartener." Early in her reply brief Schilders argues, "Stupp misrepresents the December 2014 decision, saying that 'the court ordered [the child] to be enrolled in the San Carlos school district for the 2015-2016 year.' The order, filed February 6, 2015, says, 'Petitioner shall enroll [the child] in the San Carlos School District within two weeks to 30 days from today between January 6 and January 22, 2015.' " Schilders's argument in her reply serves no purpose except to concede by implication the significance of the December 2014 decision, which she failed to mention in her opening brief. Even if Stupp had mischaracterized the family court's order, he raised two undisputed and significant facts: the family court ordered the child to be enrolled in public school, and that pursuant to the order, the child would be attending public school as of the fall of 2015. Schilders made no mention of these facts in her opening brief, and she does not concede that the child is

In July 2015, Stupp moved to dismiss the appeal, arguing that the July 31, 2014, order is a non-appealable interlocutory order as to the preschool issues and the allocation of the cost of the custody allocation, and that the appeal is moot as to the preschool issues and the allocation of the cost of the child's therapy. Fourteen days later, on the day before the deadline to respond to the motion, Schilders requested an extension of 50 days to file her opposition. We issued an order denying the request for extension, taking Stupp's motion to dismiss under submission to be decided with the merits of the appeal, and informing Schilders that she could raise any opposition to the motion in her reply brief.

DISCUSSION

We turn first to the orders addressed in Stupp's motion to dismiss: the temporary orders regarding the child's attendance at the PJCC preschool; the order that Schilders advance 40 percent of the cost of the custody evaluation; and the order that the cost of therapy for the child be equally divided between Stupp and Schilders. We then turn to Schilders's appeal of the family court's order reserving her request for attorney's fees.

A. *Orders Concerning Preschool Attendance and the Advancing of Costs for the Custody Evaluation*

We have jurisdiction over Schilders's appeal of the family court's July 31, 2014, orders only if those orders are appealable. (*Griset v. Fair Political Practices Commission* (2001) 25 Cal.4th 688, 696.) The rules of court require the appellant's opening brief to "explain why the order appealed from is appealable." (Cal. Rules of Court, rule 8.204(a)(2)(B).) In her opening brief, Schilders asserts that the July 31 order is appealable under Code of Civil Procedure section 904.1, subdivision (a)(2) "or" subdivision (a)(10).[6] Section 904.1, subdivision (a)(2) authorizes appeals from orders

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no longer attending the PJCC preschool until the very last page of her reply brief, where she embeds the concession in a subordinate clause.

[6] All statutory references are to the Code of Civil Procedure unless otherwise stated.

made after appealable judgments, and subdivision (a)(10) authorizes appeals from orders "made appealable by the provisions of . . . the Family Code."

In his motion to dismiss, Stupp offers two arguments why the July 31 orders are not appealable. First, he argues that none of the orders are appealable under section 904.1, subdivision (a)(10), because the only statutory provisions for appeal in the Family Code are in Family Code section 2025, which concerns the appeal of a bifurcated issue upon certification by the trial court, and Family Code section 17407, which concerns an appeal by the Attorney General of a support-related order, and neither section applies here. Second, relying on *Lakin v. Watkins Associated Industries* (1993) 6 Cal.4th 644 (*Lakin*) and *In re Marriage of Ellis* (2002) 101 Cal.App.4th 400 (*Ellis*), he argues that orders concerning the child's attendance at the PJCC preschool and the preliminary allocation of the cost of therapy are not appealable, contending that even though they are postjudgment orders, they are nonappealable temporary orders made preparatory to later proceedings.

Schilders's only response to Stupp's arguments is a single sentence in her reply brief under the heading "Appealability": "Schilders reaffirms her assertion, made in response to Stupp's motion to dismiss, that the order is appealable."[7] She supports that single sentence with a citation to the page of Stupp's respondent's brief in which Stupp refers to his motion to dismiss. We do not regard this as an adequate response to Stupp's argument, but we nevertheless look to Schilders's short statement of appealability in her opening brief, which invokes subdivisions (a)(2) "or" (a)(10) of section 904.1. Schilders does not cite any section of the Family Code that would make any of the July 31 orders appealable under subdivision (a)(10), and we do not undertake to review the Family Code and analyze each section to determine whether it applies. (*Maral v. City of Live Oak* (2013) 221 Cal.App.4th 975, 984-985 [" '[A]n appellate court is not required to examine

[7] This statement might suggest that Schilders submitted a separate response to Stupp's motion to dismiss. She did not. She submitted a request for an extension of time to respond to the motion, and that request was silent as to the substantive issues raised in Stupp's motion.

undeveloped claims, nor to make arguments for parties. [Citation.]' [Citation.] Our role is to evaluate 'legal argument with citation of authorities on the points made.' "]; *Mansell v. Board of Administration* (1994) 30 Cal.App.4th 539, 546 ["it is not this court's function to serve as . . . backup appellate counsel"].) So we turn to the question whether the orders concerning preschool and the allocation of the cost of the custody evaluation are appealable as postjudgment orders under section 904.1, subdivision (a)(2). We are persuaded by Stupp's argument that they are not.

Section 904.1, subdivision (a)(2) permits the immediate appeal of an order made after an appealable judgment. But "this does not literally mean that *any* order after a previous judgment is appealable. To be appealable, a postjudgment order must meet certain requirements. [Citation.] Some postjudgment orders are not appealable because, 'although following an earlier judgment, [they] are more accurately understood as being preliminary to a later judgment, at which time they will become ripe for appeal. [¶] . . . [¶] . . . [Such postjudgment orders lack] finality in that they [are] also preparatory to later proceedings.' " (*Ellis*, *supra*, 101 Cal.App.4th at p. 403, citing and quoting *Lakin*, *supra*, 6 Cal.4th at pp. 651-653.) Moreover, it is well-established that temporary custody orders are not appealable. (*Lester v. Lennane* (2000) 84 Cal.App.4th 536, 558.)

Here, the order requiring the child to attend the PJCC preschool five days a week is, by its terms, "a temporary order," in effect "until the conclusion of the updated custody evaluation ordered on July 22, 2014."[8] Because that order is temporary, so too is the order requiring Schilders to insure the child's timely attendance at the PJCC preschool during her custodial time. These orders are clearly preparatory to later

[8] The full text of the order is, "Commencing August 1, 2014 and continuing until the conclusion of the updated custody evaluation ordered on July 22, 2014, the minor [child's name] shall attend preschool at the Peninsula Jewish Community Center in the 5 day a week program. This is a temporary order intended to maintain the status quo set by former Judge Chernick's order filed September 5, 2013 finding that the rational[e] of a small school capable of dealing with the language special needs of [the child] still applies and is an attempt to minimize the changes in [the child's] life apparently occurring during this conflicted custody situation. Both parties shall have equal access to the school administrators and teachers."

proceedings in which the court will rule on custody; they are not rulings made at the end of such proceedings. (*Ellis*, *supra*, 101 Cal.App.4th at p. 403.)

Stupp also argues that the appeal is moot with respect to the orders concerning the child's attendance at preschool, because the child is now enrolled in kindergarten in public school, and has been for several months. He cites legal authority to support his argument. Schilders's response is to state, without any citation to authority, "the issue is not moot, because at any time, Stupp can decide again that he wants the child enrolled in a religious program on Schilders' custodial time." That statement is not an adequate response to Stupp's argument.

We agree that the appeal of the preschool orders is in any event moot. "Generally, an appeal will be dismissed as 'moot' when, through no fault of respondent, the occurrence of an event renders it impossible for the appellate court to grant appellant any effective relief." (Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2015) ¶ 5:22, p. 5-6 (Eisenberg et al.), citing *Eye Dog Foundation v. State Board of Guide Dogs for the Blind* (1967) 67 Cal.2d 536, 541.) Through no fault of Stupp, the child is no longer in preschool. Even if we decided that the family court erred in ordering the child to attend the PJCC preschool and in ordering Schilders to ensure the child's attendance there during her custodial time, we could not now provide Schilders with any effective relief as to the child's time in preschool.[9] Accordingly, even if the family court's orders pertaining to the PJCC preschool were appealable, we would dismiss the appeal of these orders as moot.[10]

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[9] By suggesting that we reverse or nullify the order because a family court order requiring a child to attend a religious preschool on a custodial parent's time, over the objections of that parent "is also capable of happening to others yet evade review," and is "an issue of public importance," Schilders appears to concede that the appeal is moot. Although we do have discretion to decide a case that, though moot, "poses an issue of *broad public interest that is likely to recur*" (Eisenberg et al., *supra*, ¶ 5:32, p. 5-13), we decline to exercise our discretion to decide moot issues here.

[10] Because the family court's orders regarding the child's attendance are not appealable, and because the appeal is in any case moot, we do not reach Schilders's arguments that the family court erred by making its orders without an evidentiary

Like the orders concerning preschool, the family court's order that Schilders advance 40 percent of the cost of the custody evaluation is a temporary order made preparatory to future proceedings: it is, by its terms, "subject to reallocation by the court." As a temporary order, it is not appealable.[11] (*Lakin*, *supra*, 6 Cal.4th at pp. 651-653; *Ellis*, *supra*, 101 Cal.App.4th at p. 403.)

In any event, if the order were appealable and we were to consider the merits, we would affirm. The Family Code authorizes the court to appoint a child custody evaluator in contested proceedings involving child custody and visitation, like the proceeding here (Fam. Code, § 3111, subd. (a)), and to order the parties to pay all or part of the cost of the evaluation, if it finds that the parties "able to pay all or part of the expense." (Fam. Code § 3112, subd. (a).) The family court's findings of fact are reviewed for substantial evidence. (*In re Marriage of Gonzalez* (1976) 57 Cal.App.3d 736, 745 ["The power of a reviewing court begins and ends with a determination of whether there is in the record

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hearing, by ordering the child to attend a religious preschool, by making its orders without requiring the parties to participate in mediation, and by ordering the child to attend the religious preschool on her custodial days without her consent.

[11] The July 31, 2014, order stated the advancing of costs for the custody evaluation was "subject to reallocation by the court." But the record does not show that Schilders ever asked the family court to make a reallocation. Instead, on August 15, 2014, Schilders filed a motion asking in the alternative for a new trial under section 657, or for the family court to set aside and vacate the order making its temporary allocation under sections 663 or 473, subdivision (d), and then removed the hearing for that motion from the court's calendar. Schilders resists Stupp's characterization of her cancelling the hearing as "dropp[ing] her motion," and suggests that because the family court issued its orders on July 31, she had no choice but to file a notice of appeal by late September, and that it would have been pointless for the family court to hear her motion on the scheduled date of October 7, which was more than 60 days after the entry of the orders, because the family court would have lost jurisdiction to hear her section 663 motion. But Schilders made a tactical choice to file those motions, and a tactical choice as to when to file her notice of appeal. By filing her motion under sections 657, 663 and 473 on August 15, she extended the time to file her notice of appeal until late October at the very earliest. (§ 660; § 663a, subd. (b); Cal. Rules of Court, rules 8.104, 8.108(b)(1)(B).) Moreover, the family court would have had jurisdiction to hear her section 473 motion on October 7 if she had not filed her notice of appeal before that (§ 473, subd. (d)), and she does not contend otherwise.

substantial evidence, contradicted or uncontradicted, which supports the result reached; and we must also assume in favor of the determination below the existence of every fact which the trier of facts could have reasonably deduced from the evidence"].) We presume "that the trial court made all factual findings necessary to support the judgment [or order] for which there is substantial evidence; all intendments are indulged in favor of the judgment or order, and appellate review is limited to searching the record for any substantial evidence that will support the lower court's 'implied findings.' " (Hogoboom et al., Cal. Practice Guide: Family Law (The Rutter Group 2015) ¶ 16:215, p. 16-76.)

Here, it appears that substantial evidence supports the family court's implied finding that Schilders could advance 40 percent of the cost of the custody evaluation. The family court had before it recent income and expense declarations from both parties, as well as objections from Schilders to Stupp's declaration. Schilders's most recent declaration showed that her income in the previous month had consisted of $7,000 in spousal support, and that she received an additional $1,000 per month in spousal support every six months. Stupp's most recent declaration showed that his gross income in the previous month was $13,333, and his average monthly income over the past year was somewhat more than twice that amount, from which, of course, he paid spousal support to Schilders. Schilders cites no authority to support her contention that the family court abused its discretion in ordering Schilders to advance 40 percent of the cost under these circumstances.

Further, if we were to reach the merits, we would reject Schilders's contention that the family court erred in making this temporary allocation "without first determining the [total] costs," because Schilders did not raise that issue in the family court, but rather raises it for the first time on appeal.[12] (*Hepner v. Franchise Tax Board* (1997) 52

[12] At the July 22, 2014 hearing, the family court stated, "[T]he Court is going to appoint Dr. Packer to perform a Brief Focus Assessment. The issue would be an updated evaluation as to whether the current timeshare is appropriate and in the best interest of the child and whether psychological evaluations on either party would be appropriate. And if so, to have those done as part of the evaluation." The family court explained its reasoning for appointing Dr. Packer, who had conducted previous custody evaluations in

Cal.App.4th 1475, 1486 (*Hepner*) ["Points not raised in the trial court will not be considered on appeal"].)

In sum, the orders regarding the child's attendance at the PJCC preschool and the advancing of costs for the custody evaluation are postjudgment orders, but they are not appealable because they are temporary orders that are preparatory to further proceedings. We therefore dismiss Schilders's appeal as to these orders.

B. *Order Concerning Payment for the Child's Therapy*

Stupp contends that the order requiring the parties to share equally in the cost of child's therapist is moot. He argues that the family court subsequently ordered Stupp to pay for the cost of additional sessions, "effectively changing the cost division from 50/50 to 75/25," and that Schilders concedes that a cost division that requires her to pay less than one-third is appropriate. Schilders does not dispute that the cost allocation has changed as Stupp describes, but denies that she concedes that the cost division is appropriate. She also argues that "a reversal would have a retroactive effect to provide . . . relief." We will assume that a reversal could provide Schilders with relief (Eisenberg et al., *supra*, ¶ 5:22, p. 5-6), and we will not read Schilders's statements about the

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this case: "If we use someone else, we would be looking full custody evaluation. It will take a lot longer and get much more expensive. And I've got confidence in Dr. Packer's ability to be fair and thorough in an updated evaluation. So she's just going to start from where we stopped before." Schilders then requested that the court order Stupp to pay for the custody evaluation. The family court stated that it was inclined to require Stupp to advance the full cost. After a request from Stupp that the court take the matter under submission and a request from Schilders that the court require Stupp to pay the cost outright rather than "just . . . front the money," the family court stated it would review the parties' updated income and expense declarations before making any allocation. Schilders did not raise any questions, concerns, or objections about the need to determine the cost of the evaluation before the cost was allocated.

We disregard the inappropriate and irrelevant first-person statements by Schilders's attorney in the reply brief regarding her own ignorance of the costs associated with Dr. Packer's services. We remind counsel that assertions of fact must be supported with citations to the record. (See Cal. Rules of Court, rule 8.204(a); *Yeboah v. Progeny Ventures, Inc.* (2005) 128 Cal.App.4th 443, 451 [citing an earlier version of the California Rules of Court].)

allocation of costs as a concession. Accordingly, we do not dismiss the appeal of this order as moot.

We affirm the family court's order. Schilders has not preserved her claim of error as to this issue, because she did not raise the issue in the family court. (*Hepner*, *supra*, 52 Cal.App.4th at p. 1486.) The family court heard argument on the issue of therapy for the child, including who the therapist should be.[13] Schilders, however, did not make any request or argument regarding the allocation of the cost of the child's therapy in her numerous filings in opposition to Stupp's request or at the hearing before the family court.[14] It was not until after the family court ordered that the cost of therapy be equally divided that Schilders raised any objection: she said nothing about the allocation of the cost of therapy before she filed her August 2014 motion asking in the alternative for a new trial under section 657, or for the family court to set aside and vacate its allocation under sections 663 or 473, subdivision (d). As we have discussed, she removed the hearing on this motion from the court's calendar.[15]

Moreover, Schilders's failure to raise the issue below means that her argument that the family court erred is faulty. As Schilders explains in her opening brief, the default allocation for expenses like the child's therapist is an equal division. (Fam. Code, § 4061, subd. (a).) The family court may order a different allocation, but only upon the request of a party. (Fam. Code, §4061, subd. (b).) Thus, in her brief, Schilders writes that costs of the sort at issue here "*must* be ordered to be paid by the parent equally *unless* either parent *requests* a different apportionment and *presents* documentation showing that a different apportionment would be more appropriate." (Emphasis added.) From Family

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[13] In its July 31, 2014 order, the family court appointed the therapist that Schilders had requested.

[14] At the July 22, 2014 hearing, Schilders asked the family court to have Stupp bear the full cost of the custody evaluation. She made no such request regarding the cost of therapy at that hearing, or at the June 10 or June 23 hearings.

[15] In August 2014, 2014, Schilders filed a single motion in the family court addressing the July 31 orders regarding the child's preschool, the temporary allocation of the cost of the custody evaluation, and the allocation of the child's therapy.

Code section 4061, subdivision (a), and a case holding that the family court may allocate this type of expense based on the parent's income at the time the expenses are incurred (*In re Marriage of Lusby* (1998) 64 Cal.App.4th 459, 474), she argues that the family court "should have considered the parties' respective incomes and ability to pay, and ordered a proportionate allocation as specified in Family Code section 4061[, subdivision](b)."

Schilders's argument ignores crucial language in Family Code section 4061, subdivision (a), even though Schilders acknowledges and paraphrases it in her brief: "the expenses *shall* be divided one-half to each parent, *unless either parent requests a different apportionment pursuant to subdivision (b)* and presents documentation which demonstrates that a different apportionment would be more appropriate." (*Ibid.*, emphasis added.) But, as we discussed above, Schilders did not request any particular apportionment of the cost of the child's therapist until after the court ruled on the issue, when she made her motion to set aside and vacate the court's orders, which she subsequently took off calendar. In these circumstances, where the family court has followed the procedures set forth in the Family Code, where Schilders's request for an unequal apportionment was made only after the family court ruled, and where the party's own actions in filing a notice of appeal and cancelling a hearing prevented the family court from ruling on the request, we decline to find any error.

C. *Reservation of Schilders's Request for Attorney's Fees and Costs*.

On the first page of her opening brief, Schilders states that she is appealing the family court's reservation of her request for attorney's fees and costs. She says nothing else about this issue until the end of her Conclusion, in which she writes, "The court should have considered Schilders's request for attorney's fees and decided the matter based on the statutory guidelines of the Family Code." Stupp argues that Schilders has waived this issue by failing to support it with authority or argument. Schilders does not mention the issue at all in her reply brief—not even to respond to Stupp's argument.

An order that is challenged on appeal is presumed to be correct. (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564.) It is the appellant's burden to affirmatively

demonstrate error, (*ibid.*) and to present argument and legal authority on each point raised. Thus, Schilders must do more than "simply say the court erred, and leave it up to the appellate court to figure out why." (*Niko v. Foreman* (2006) 144 Cal.App.4th 344, 368; see Cal. Rules of Court, rule 8.204(a)(1)(B).) Because Schilders has provided no argument or authority that shows error by the family court, we affirm the order reserving her request for attorney's fees and costs.

DISPOSITION

The appeal is dismissed as to the family court's July 31, 2014, orders regarding preschool attendance and the advancing of costs for the custody evaluation. The July 31, 2014, orders of the family court requiring Stupp and Schilders to share the cost of the child's therapy and reserving Schilders's request for attorney's fees and costs are affirmed. Respondent shall recover his costs on appeal.

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Miller, J.

We concur:

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Kline, P.J.

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Stewart, J.